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Supreme Court of the United States

OCTOBER TERM, 1951

No. 8

IRVING ADLER, GEORGE FRIEDLANDER, MARK FRIEDLANDER,
MARTA SPENCER, SAMUEL KRIEGER, WILLIAM NEWMAN,
DAVE TIGER and EDITH TIGER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

APPELLEE'S BRIEF

December 21, 1951.

DENIS M. HURLEY,
*Corporation Counsel of the
City of New York,
Attorney for Appellee.*

MICHAEL A. CASTALDI,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
BERNARD FRIEDLANDER,
of Counsel.

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APPELLEE'S BRIEF

Opinions Below.

This case, wherein the plaintiffs-appellants seek a declaratory judgment establishing the unconstitutionality of the so-called Feinberg law (New York Laws of 1949, Ch. 360; printed in Appendix A of this brief, pp. 42-45), is before this Court after a unanimous decision by the New York Court of Appeals sustaining the constitutionality of such law and affirming a dismissal of the complaint by the Appellate Division, Second Department. The validity of the law was likewise upheld by the unanimous decision of the Appellate Division, which reversed a decision by the Supreme Court, Kings County, ruling the statute unconstitutional and granting the plaintiffs judgment on the pleadings. An opinion was written by each Court.

plores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

§ 2. Sections three thousand twenty-two, three thousand twenty-three, and three thousand twenty-four of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, are hereby re-numbered to be sections three thousand twenty-three, three thousand twenty-four and three thousand twenty-five respectively.

§ 3. Article sixty-one of the education law, as added by chapter eight hundred twenty of the laws of nineteen hundred forty-seven, is hereby amended by adding thereto a new section, to be section three thousand twenty-two, to follow section three thousand twenty-one of such article, to read as follows:

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employes in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a

listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide, in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

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EDUCATION LAW

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

CIVIL SERVICE LAW

§ 12-a. *Ineligibility.* No person shall be appointed to any office or position in the service of the state or of

any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open

court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

RULES OF THE BOARD OF REGENTS

(Adopted July 15, 1949)

CHAPTER XV-B

SUBVERSIVE ACTIVITIES

SECTION 254. *Disqualification or removal of superintendents, teachers and other employees.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employees who violate the provisions of section 3021 of the Education Law or section 12-a of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later

than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges

as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

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APPENDIX B

EXCERPTS FROM ARTICLES ON ACADEMIC FREEDOM

1. Max Lerner in *The American Scholar*, Summer 1949, p. 338:

"What happens in the end is that the universities become uncreative—not in the Russian way of fanatical dogmatism, which is bad enough but presents no calculable danger in America, but in the American way of growing anemic, safe for everything except what requires courage and challenges the structure of power.

As the *New Yorker* editors put it, the firing of Communists would make 'millions of highly fit Americans a little cautious, a little fearful of having naughty thoughts, a little fearful of believing differently from the next man, a little worried about associating with a group or party or club.' And again, 'in this land an ousted professor is not an island entire of itself; his death diminishes us all.'

"The problem then, as I see it, is not so much one of academic freedom to bail out men who themselves despise it, but one of intellectual health to keep the universities alive. I do not minimize the risk involved when men are allowed to continue teaching whose allegiance to some onward-and-upward or some downward-to-the-pit cause is greater than their allegiance to the open mind. But every course of action involves a balancing of risks. The question is: what risk can we best afford to take—that a few Communists will have their jobs protected, or that the competition of ideas will be hedged in and *No Trespassing* signs will be put up where they least belong in American life?"

2. Helen M. Lynd in *The American Scholar*, Summer 1949, p. 353:

"The thing [that stands out most clearly in all this is that when Communists are made the focus of attack, the main damage is done, not to Communists, but to all independent thought and action. As Dr. Meiklejohn says, 'All teachers are placed on probation.' And all teaching and all students and all democratic activity are thereby impoverished. The actual effect of this approach to academic freedom is to drive communism underground and to cast suspicion on anyone who supports any liberal or progressive cause."

3. Kalman Seigel in *New York Times*, May 10, 1951, p. 28:

"Such caution, in effect, has made many campuses barren of the free give-and-take of ideas, the study found. At the same time it has posed a seemingly insoluble problem for the campus liberal, depleted his ranks and brought to many college campuses an apathy about current problems that borders almost on their deliberate exclusion."

4. Report of National Education Association, as summarized by Dr. Martin Essex in N. Y. Times, July 6, 1951, p. 25:

"Teachers avoid reference in the classroom to sex, criticism of prominent persons, separation of church and state, race relations and communism (in that order), the study showed. They are afraid, it asserted, that if these—and other controversial topics—are mentioned in the classroom, the parents, supervisors or outside groups will pounce on them and 'hang them' professionally. Teachers are frightened to 'stand up and be counted,' Dr. Essex said.

"A serious implication of the study, said Dr. Essex, is that teachers now take for granted the policy of not offending anyone. They seek to keep peace within their ranks, but they pay 'an awfully high price for it,' he added. For the most part, the teachers themselves keep out controversial issues, or anything that might offend a member of the school board of the community.

"We call it voluntary censorship,' explained Dr. Essex. 'It is the most insidious force in public-school life today.'

"Textbooks are removed, even though they have been used for twenty or more years, simply to avoid getting into a row with the pressure groups,' Dr. Essex said. 'This is an utterly absurd and untenable situation. Voluntary censorship is growing by leaps and bounds throughout the country. It is a serious problem, one that affects the basic liberties and freedoms of our schools.'

5. Editorial, N. Y. Times, July 9, 1951:

"The National Education Association's report on 'The Freedom of the Public School Teacher' makes a gloomy reading. Fearful of controversy and harried by pressure groups, public school teachers over the country, the report declares, are increasingly reluctant to discuss in the classroom such topics as separation of church and state, race relations and communism. 'Voluntary censorship' is increasing rapidly and textbooks are changed because of pressure from particular groups even though such texts may have been

otherwise satisfactory for years. Here surely is an unhappy picture, alleviated only by the fact that the National Education Association recognizes the situation for what it is and is combating it.

"Obviously this tendency weakens our public school system in its prime function: the preparation of our young people for adult life in which there is controversy on many issues. 'Voluntary censorship' of the type here described is a withdrawal from reality not to be condoned either because these matters are 'delicate' or because there are strong forces and conflicts raging about them. As adult citizens, those who are now in our schools will have to face these and other problems and participate in the social processes which they generate. Questions of this kind cannot be avoided and the only alternatives are whether the schools are or are not going to prepare their students to cope with such problems.

"To the extent that our teachers have surrendered before particular interest groups, or before vague fears, they are to be criticized, and the N.E.A. report is implicitly such a criticism. But the more important part of the blame falls on the community at large, on the vast mass of citizenry who believes in the democratic process but who have not taken steps to exert counter-pressure for the maintenance of our schools as free forums in which all major problems are faced. Minority pressure groups and timorousness will rule so long as those who are concerned about free expression remain silent. The solution to this unhealthy situation is clear; it is up to all of us to take the necessary action to effectuate that solution."